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A Common Lawyer's Perspective on the European Perspective on Punitive Damages

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While punitive damages are well-entrenched in the common law legal systems of the United States[1] and Great Britain,[2] they have a far smaller role in the civil law tradition of Continental Europe. Writing in these pages a year ago, Professor Helmut Koziol offered "a European Perspective" on punitive damages.[3] He pointed out that punitive damages are generally disfavored in Continental legal systems,[4] expressed his own disapproval of them,[5] and offered an array of reasons for rejecting or restricting their use.[6] Professor Koziol's article is typical of punitive damages scholarship in its focus on normative issues raised by the doctrine —whether, why, and under what criteria should punitive damages be awarded. The literature addressing questions of this kind is extensive and sophisticated, and I have nothing to contribute to it.[7] Rather, this Article takes a comparative perspective, exploring the civil law–common law divide as it relates to punitive damages.

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1. *See* DAN B. DOBBS, THE LAW OF TORTS 1062–66 (2000) (discussing the role of punitive damages in American tort law). Louisiana is a special case. *See* John W. deGravelles, *Louisiana Punitive Damages—A Conflict of Traditions*, 70 LA. L. REV. 579 (2010). Most of American tort law is state law, but there are exceptions. Maritime law, for example, is federal common law. For analysis of the role of punitive damages in that area, see David W. Robertson, *Punitive Damages in U.S. Maritime Law*, 70 LA. L. REV. 463 (2010).

2. *See* B.S. MARKESINIS & S.F. DEAKIN, TORT LAW 726–30 (4th ed. 1999) (discussing English law).

3. Helmut Koziol, *Punitive Damages—A European Perspective*, 68 LA. L. REV. 741 (2008).

4. *Id.* at 748 & n.44.

5. *Id.* at 743. *See also* YVONNE LAMBERT-FAIVRE, LE DROIT DU DOMMAGE CORPOREL 527–28 (5th ed. 2004) (strongly opposing the American view).

6. Koziol, *supra* note 3, at 751–58.

7. Recent contributions to that literature include, among others, Thomas B. Colby, *Clearing the Smoke From* Philip Morris v. Williams: *The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392 (2008) [hereinafter Colby, *Clearing the Smoke*]; Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957 (2007); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003); Benjamin v. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005).

My premise, a familiar one to comparative scholars, is that we may better understand, appreciate, evaluate, and criticize our own system by standing outside it, studying another, and then looking at our own practices with fresh eyes.[8] Some differences among the black letter rules of one legal system and those of another represent different responses to straightforward value choices, such as whether the plaintiff's negligence should preclude recovery or merely diminish it.[9] Others may illustrate a variety of means aimed at achieving a common goal. To some extent, the variety of definitions of "design defect" may fall into this category.[10] Comparisons between the ways different legal systems deal with substantive policy choices in making legal norms can be useful because they can show that our own approach is not inevitable and invite us to question it rather than take it for granted.[11] One may find in another system an attractive solution to a vexing problem or an especially convincing line of argument for one rule over another.[12] Thus, some of the policy arguments advanced in favor of punitive damages have influenced the development of European Community law[13] and even have some influence on German law.[14]

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8. *See, e.g.*, P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 418 (1987) ("The comparativist will argue, and we think rightly, that an observer cannot understand his own legal system sufficiently until he understands what his system is *not*. Without comparing it to a relevantly different system, he simply cannot adequately grasp what his own system is not.").

9. Most common law and civil law jurisdictions have adopted the comparative fault principle, but a few American states hold out for the absolute defense. *See* DOBBS, *supra* note 1, at 504 (noting that, as of the 1980s, Alabama, Maryland, North Carolina, and Virginia persisted in treating contributory negligence as an absolute defense).

10. For a comparative treatment, see Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751 (2003).

11. *See, e.g.*, BERNHARD GROSSFELD, THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW 11 (1990) (noting that, among other things, comparative law "can certainly help us to elicit the essentials of our own law," "expose any oversophistication or imprecision in legal doctrine," and "confirm or confute doctrinal principles and postulates").

12. *See* K. ZWEIGERT & H. KOTZ, 1 AN INTRODUCTION TO COMPARATIVE LAW 15–17 (Tony Weir trans., Clarendon Press 2d rev. ed. 1987) (1977) (noting that "[c]omparative lawyers often propose that their own system should adopt, with regard to a particular problem, a solution which they have found to obtain abroad").

13. *See* Koziol, *supra* note 3, at 748–49 (noting that "an inclination towards punitive damages exists in some [EU] directives").

14. *See, e.g.*, Volker Behr, *Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105, 153–60 (2003).

Conversely, the civil–criminal distinction that weighs so heavily in European law has influenced rulings by the United States Supreme Court that curb the scope of punitive damages while not eliminating them altogether.[15]

Other disparities among legal systems are of a different order. They cannot be fully understood as differences as to which of two competing values ought to outrank the other. Rather, they reflect the phenomenon of "path dependence." I use that concept here to denote the ways in which the paths taken by the two legal cultures have diverged, resulting in sharp differences in certain basic features of the respective legal traditions.[16] For example, "[i]t is hard to believe . . . that the heavy use of the civil jury in the United States is unrelated to differences between English and Continental administration that go back to the Middle Ages."[17] In order to grasp these differences among legal systems, the comparison must go beyond legal rules to include history and culture as well. As comparative law scholar, Bernhard Grossfeld points out, "[o]ften

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15. Two recent cases drive home this point. In *Philip Morris USA v. Williams*, 549 U.S. 346, 352–53 (2007), the Supreme Court prefaced its discussion of the specific constitutional issues by stressing that due process requires safeguards against arbitrary imposition of punishment in the award of punitive damages. Writing for the Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 417 (2003), Justice Kennedy pointed out that punitive awards "serve the same purposes as criminal penalties," yet defendants "have not been accorded the protections applicable in a criminal proceeding." This anomaly, he explained, underlies the Court's decisions that impose due process restrictions on the award of punitive damages. *See id.* at 417–18. For a comprehensive discussion of the federal constitutional issues, see Thomas Dupree, *Punitive Damages and the Constitution*, 70 LA. L. REV. 421 (2010).

16. *See* Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 584 (2000) [hereinafter Posner, *Past-Dependency*]. According to Judge Posner, "there can be little doubt that path dependence is an important phenomenon in law." *Id.* He supports this point by enlisting the comparative. Thus, "[s]ome evidence of this is that the convergence of legal systems is much slower than the convergence of technology and economic institutions." *Id.*

17. *Id.* For another illustration of how doctrinal differences may be better explained not by divergent value choices but by cultural assumptions, see Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 208–09 (2009). After examining aggregate litigation in the two cultures, Issacharoff and Miller conclude that "[a]t bottom, the gulf between the European and American developments in class actions and other forms of aggregate litigation reflects a deeper divide than doctrines and formal laws alone would reveal." *Id.* at 208. Rather, European–American differences may have more to do with Europe's "top-down" approach to regulation, in contrast to the "bottom-up" method of the common law. *Id.* at 209.

the thing that 'goes without saying', that remains unspoken, never questioned, has a greater impact than what we call law."[18]

In my view, the civil law–common law split on punitive damages falls into this category of path dependence. Thus, it is easy enough to understand how it is that Nebraska makes a value choice against punitive damages[19] while Georgia accepts them.[20] The two jurisdictions simply weigh the pluses and minuses differently.[21] The *general* acceptance of punitive damages in the common law world and their *general* rejection in Continental legal systems is another matter. If the availability of punitive damages turned solely on deciding how much weight to put on one value or another, one would hardly expect to see a pattern that more or less neatly tracks the civil law–common law divide. But then the question arises: why is it that societies with so much shared history and so many shared values diverge so sharply on punitive damages?

The answer, I will argue, lies in a basic cultural difference between the civil law and the common law traditions. The notion of awarding punitive damages for private wrongs is somewhat at odds with the distinction *both* traditions draw between private and public law. Nonetheless, there are strong policy arguments for such damages. The cultural explanation for the civil law–common law divide is that lawyers, judges, and legislators trained in the civil law learn that law is a body of rules and are thereby better equipped to maintain the formal distinction between the two domains in the face of policy arguments for exceptions. By contrast, students of the common law study discrete cases and the facts, reasons, and distinctions courts rely on to resolve them. The history of the common law is one of endless innovation and assimilation of new ideas. General principles are always giving way, and students learn that rule-based arguments routinely lose in the battle between form and substance. The acceptance of punitive damages is an illustration of that general theme.

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18. GROSSFELD, *supra* note 11, at 9.

19. *See, e.g.*, Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989) (per curiam).

20. For a recent illustration, see *Brown & Williamson Tobacco Co. v. Gault*, 627 S.E.2d 549, 552–53 (Ga. 2006) (holding that an earlier award of punitive damages to the state precluded the award to these plaintiffs because they were in privity with the state).

21. The conflict of laws and forum shopping issues created by variations in punitive damages doctrine from state to state are discussed in Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 LA. L. REV. 529 (2010).

If I am right that something more than straightforward "pluses and minuses of punitive damages" value choices are at stake here, then path dependence may be the key to the divergence between civil law and common law systems. We must study the history of how law developed in the two legal traditions, or as William Ewald puts it, "the effort by jurists, over time, to deepen their understanding of law and what it requires."[22] Luckily, generations of accomplished comparativists and legal historians have done the basic research bearing on the issues I wish to address. I will draw heavily on their work and borrow their insights for my purposes. Part I discusses the civil law tradition, Part II turns to the common law, and Part III argues that certain historical contingencies do much to explain why common law systems are less resistant than civil law systems to anomalous doctrines like punitive damages.

I. WHY THE CIVIL LAW TRADITION REJECTS PUNITIVE DAMAGES

Professor Koziol's argument against punitive damages begins with the basic principle that "punishment is outside of the private law."[23] This is so because "penalties express public disapproval of certain behaviour."[24] Yet "punitive damages are then awarded to an individual who has neither suffered damage to that amount nor has a claim for unjust enrichment."[25] The basic problem with punitive damages is that "in the area of private law a rule always concerns the relationship between two or more legal subjects."[26] Awarding such damages "is against the structural principle that, under the private law, legal consequences need mutual justification."[27] Professor Koziol concludes that "[e]ven if there are very strong arguments for imposing a sanction on the defendant, these arguments alone cannot justify awarding the plaintiff an advantage when he has suffered no corresponding damages and has no unjust enrichment claim against the defendant."[28]

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22. William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1949 (1995). *See also* GROSSFELD, *supra* note 11, at 8 (asserting that "the only sensible way to treat" comparative law is as "the comparison of legal cultures").

23. Koziol, *supra* note 3, at 751.

24. *Id.*

25. *Id.* at 751–52.

26. *Id.* at 752.

27. *Id.*

28. *Id.*

This line of reasoning illustrates three characteristic features of the "folklore" of the civil law tradition.[29] The first is "the importance of clear cut concepts."[30] The general premise—that "punishment is outside of the private law"[31]—leads quickly to the conclusion that the plaintiff in a tort case may not obtain non-compensatory damages. "Judges, according to the folklore, are merely the operators of a machine designed by scientists and built by legislators."[32] The "machine" they operate in deciding private law issues is the civil code, which "marks a new beginning"[33] and is conceived of as "the whole law."[34] Once the civil code is adopted, "[w]hat is wanted is the correct interpretation of the code provision, not its forerunners."[35] The result is that, since the installation of the French Civil Code after the Revolution and the German Civil Code later in the nineteenth century, civilians have tended to stress the importance of very general legal norms, which are located in the relevant code.[36]

The second characteristic of the civilian tradition is the heavy reliance on principles of "relationship" (i.e., that "in the area of private law a rule always concerns the relationship between two or more legal subjects") and "structure" (i.e., "the structural principle that, under the private law, legal consequences need mutual

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29. The term "folklore" is borrowed from JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 80–82, 84 (2d ed. 1985). Professor Merryman's point is that the reality of civil law adjudication differs from this image. Thus, "[t]he gap between the model of the legal process that has grown out of the civil law tradition on the one hand, and what people and institutions actually do on the other, is widely appreciated within the civil law world." *Id.* at 83. Nonetheless, the folklore has a basis in reality. *See, e.g.*, ALAN WATSON, THE MAKING OF THE CIVIL LAW 135 (1981) (noting that "to a degree unparalleled in common law countries or in ancient Rome, users of a civil code are rule conscious and adopt an abstract approach to legal problems").

30. F. H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 66 (1953).

31. Koziol, *supra* note 3, at 751.

32. See MERRYMAN, *supra* note 29, at 81.

33. WATSON, *supra* note 29, at 118.

34. *Id.* at 119. In principle, the Code is "without gaps" and has "no conflicting provisions." MERRYMAN, *supra* note 29, at 29.

35. WATSON, *supra* note 29, at 131.

36. *See id.* at 135 ("The upshot of all this is that, to a degree unparalleled in common law countries or in ancient Rome, users of a civil code are rule conscious and adopt an abstract approach to legal problems."); LAWSON, *supra* note 30, at 67 ("The Romans taught the world—including even the world of the Common Law—the possibility of forming a legal framework for society, composed of the smallest possible number of elements; and the civilians of later ages have gone even further in the work of generalization, which, as it organized, also reduced the number of component parts.").

justification.")[37] One of the points of enacting a code was to rationalize the law by bringing coherence to the mass of pre-code rules, principles, and customs.[38] When creating a unified code, civilian scholars identified the relationships between these disparate sources of law and imposed an order upon them that was previously lacking.[39] Civilians learn that in working their way from general principles to rulings in particular cases, lawyers and judges should pay close attention to the structure of the law and the relationships the code identifies as important.[40]

The third feature of the "folklore" is that civilians favor formal reasoning over pragmatic problem solving. Since one reasons from clear-cut concepts to resolve the case at hand, "[t]he law is made at least to appear to grow inevitably out of a series of indisputable axioms."[41] Formalism has a downside, in that following a rule obliges one to forego the opportunity to improve the law.[42] But Professor Koziol, true to his civilian heritage, is willing to bear the cost. He finds the anti-punitive damages argument compelling "[e]ven if there are very strong arguments for imposing a sanction on the defendant."[43] This feature of the civil law has deep historical roots. One of the points of adopting the French Civil Code was to limit judicial discretion and see to it that judges simply applied the law as set forth in the Code rather than engaging in policy making.[44] Solving problems was a task for the legislature, aided by the legal scholar. Judges were seen as functionaries whose job consisted solely of using the substantive norms and the structural principles in the Code itself to resolve legal issues. It was not the judges' role to act creatively by finding ways to make law fairer or more effective at achieving the

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37. Koziol, *supra* note 3, at 752.

38. See MERRYMAN, *supra* note 29, at 27–28; WATSON, *supra* note 29, at 117.

39. See MERRYMAN, *supra* note 29, at 68–69 (discussing the "overlay of concepts and principles derived primarily from legal scholarship" that make up "the general part" of civil law textbooks).

40. For a description of "a more or less typical textbook for a civil law course," see *id.* at 69–78.

41. LAWSON, *supra* note 30, at 68.

42. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 100 (1991) ("[A] system committed to rule-based decision-making attains the benefits brought by rules only by relinquishing its aspirations for ideal decision-making.").

43. Koziol, *supra* note 3, at 752. He goes on to argue that some of the claimed benefits of punitive damages can be achieved by other means, for example, the doctrine of unjust enrichment. *See id.* at 760.

44. See MERRYMAN, *supra* note 29, at 15 (preventing judicial intrusion into policy making), 28–29 (fear of the "gouvernement des juges").

legislature's goals.[45] In practice, of course, civilian judges often depart from the formal model of adjudication.[46] Nonetheless, the formal model retains its hold on the civilian imagination, as Professor Koziol's anti-punitive damages reasoning illustrates.

II. PUNITIVE DAMAGES AND THE COMMON LAW

Common law jurisdictions differ from civil law jurisdictions not only in their greater acceptance of punitive damages, but also in the terms of the debate over them. For lawyers, scholars, and judges working in the common law tradition, the public law–private law distinction is a relevant consideration but not a decisive one. They pay much greater attention to substantive considerations, arguing over whether and how punitive damages may help to achieve one or another important goal and whether the benefits punitive damages may produce should override the general principle against punishment in the private law. Foes of punitive damages working in the common law tradition know that they cannot win just by resorting to Professor Koziol's general principles: that "[t]he idea of punishment is outside of the private law,"[47] that "punitive damages are inconsistent with the fundamental principles of private law,"[48] and that "awarding punitive damages under tort law is contrary to the separation of criminal law and private law."[49] His argument smacks too much of rule-based decision-making for American tastes. American lawyers trained in the common law method tend to treat "formalism" as a pejorative epithet.[50] Although we, too, respect the private–public

45. One of the points of the Revolution in France was to cabin the judges, who were thought to have abused their authority to the detriment of needed social change and to the benefit of the aristocracy. *See* Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 104–06 (1994) (discussing measures taken to curb judicial power).

46. For example, the French Civil Code contains just five brief articles on the topic common lawyers would call tort law. *See* C. CIV. arts. 1382–1386 (2006). Using these sections as a starting point, but no more than a starting point, the Cour de Cassation has produced a considerable amount of case law, or what the French call "jurisprudence." Much of that case law is discussed in LAMBERT-FAIVRE, *supra* note 5. *See also* 2 F.H. LAWSON & B.S. MARKESINIS, TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW 177–340 (1982) (collecting French cases on tort).

47. Koziol, *supra* note 3, at 751.

48. *Id.* at 753.

49. *Id.* at 755.

50. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 509–10 (1988) (noting that "[f]ew judges or scholars would describe themselves as formalists"). An evaluation of the merits of the American anti-formalist position can be set aside for purposes of this Article.

law distinction, no prudent common lawyer would try to put so much weight upon it, nor would he invoke an abstract proposition like "the principle of mutual justification of legal consequences"[51] as a decisive impediment to punitive damages. Rather, American lawyers and scholars know that they must identify substantive policies favoring limits on punitive damages.[52]

A. Favoring Policy Arguments over Formal Ones

Working within the common law framework, American advocates and critics of punitive damages present an array of *policy* arguments bearing on the advantages and disadvantages of permitting juries to award them and on whether and how they should be curbed in one way or another.[53] In *Kemezy v. Peters*,[54] Judge Richard Posner summarized the pro-punitive damages policy arguments. These awards make up for gaps in the compensatory award, help to deter conduct that cannot be stopped by compensatory awards (especially where the act is concealable), "make sure that people channel transactions through the market when the costs of voluntary transactions are low," express "the community's abhorrence at the defendant's act," relieve the pressures on the criminal justice system, and "head[] off breaches

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51. Koziol, *supra* note 3, at 752.

52. This focus on policy is characteristic of the American common law. Contemporary English common law tends to be more rule-oriented than the American version. *See* ATIYAH & SUMMERS, *supra* note 8, at 1 ("It is our primary thesis that the American and the English legal systems, for all their superficial similarities, differ profoundly; the English legal system is highly 'formal' and the American highly 'substantive.'"). Atiyah and Summers devote most of their book documenting that thesis. In this regard, Milsom suggests that the American approach is more in keeping with the historical development of the common law. *See* MILSOM, STUDIES, *infra* note 66, at 169–70 (discussing the greater flexibility of American common law).

53. *See, e.g.*, Colby, *Clearing the Smoke*, *supra* note 7, at 396 ("seek[ing] to provide a sophisticated theoretical and constitutional account of punitive damages as both sensible and permissible punishment for the harm to the plaintiff, but not as punishment for the harm to others"); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) (applying principles of microeconomics to punitive damages issues); Sharkey, *supra* note 7, at 352 (proposing "explicit recognition of a new category of damages—compensatory societal damages—that hitherto has comprised one significant, albeit insufficiently acknowledged, component of punitive damages").

54. 79 F.3d 33 (7th Cir. 1996).

of the peace by giving individuals injured by relatively minor outrages a judicial remedy in lieu of . . . violent self-help."[55]

When Professor Koziol, a sophisticated and experienced scholar, undertook to provide a "European perspective" on punitive damages, he knew that his American audience would, for the most part, be in favor of punitive damages and enlisted American skeptics of punitive damages to bolster his case. These scholars point out, for example, that the aim of tort law is to make the victim whole, and punitive damages are often at odds with that aim.[56] Juries have no ready means by which to measure the punitive award.[57] In certain kinds of litigation, such as products liability cases involving design defects, a number of plaintiffs may seek punitive damages, and a succession of juries may award amounts that, taken together, seem excessive.[58] To the extent the goal of awarding punitive damages is to achieve public purposes rather than to vindicate the interests of the tort plaintiff, the criminal law or administrative regulations are better mechanisms,[59] and in any event the punitive award should be paid to the state.[60]

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55. *Id.* at 34–35. *See also* Ciraolo v. City of N.Y., 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring) (arguing that punitive damages would be appropriate in a case where compensatory damages alone would "result in systematic underassessment of costs, and hence in systematic underdeterrence"). In *Ciraolo*, the 65,000 people arrested for misdemeanors had been subjected to strip searches under an illegal city policy. "Under ordinary circumstances, very few of these 65,000 victims would have been likely to sue, both because the compensatory damages they would have received would have been relatively low and because they were, no doubt, in the main, relatively poor and unsophisticated." *Id.* at 247. Another corollary of this rationale for punitive damages is that vicarious liability is inappropriate. *See* Michael J. Sturley, *Vicarious Liability for Punitive Damages*, 70 LA. L. REV. 501 (2010). Consider, too, the possibility that the case for punitive damages is especially strong in certain *substantive* contexts. *See, e.g.*, Michael L. Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 864–70 (1996) (arguing that punitive damages may be needed as a deterrent to constitutional violations since compensatory damages may fall short in that area).

56. Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 856–57, 888–90 (1988) (arguing that covering the plaintiff's litigation costs should be the main goal of punitive damages).

57. *See id.* at 834.

58. *See* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003).

59. *See* Koziol, *supra* note 3, at 762 ("[T]he best solution would be to develop criminal, administrative, and procedural laws in such a manner that the necessary prevention could be secured.").

60. Some states have at least partially adopted this reasoning by enacting statutes under which part of the award will go to the state. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 915 (9th ed. 2008).

Along with the policy debate, the American literature includes empirical studies that provide information helpful to one side or the other.[61]

This array of arguments for and against punitive damages has produced a complex body of doctrine. The rules vary from state to state. Most of the law remains judge-made common law, but statutory modifications are not uncommon, state constitutional provisions control some matters, and in recent years the Supreme Court has imposed federal constitutional restrictions on punitive damages.[62] But the Court has declined to impose categorical limits on the doctrine, such as setting fixed ratios between compensatory and punitive damages. No court or any legislature has ever succeeded in imposing any kind of order on punitive damages doctrine. In any given case, the reasoning is much more likely to be policy-oriented than conceptual. Judge Posner's opinion in *Kemezy* is typical. The specific issue in the case was whether the plaintiff is obliged to present "evidence concerning the defendant's net worth for purposes of equipping the jury with information essential to a just measurement of punitive damages."[63] After recounting the various aims of punitive damages, Judge Posner asked whether those aims justify placing such a burden on the plaintiff and decided that they do not.[64]

B. How the Common Law Developed over Time

Lawyers schooled in the common law tradition take its policy-oriented reasoning for granted. But the sharp contrast with the civil law approach—which emphasizes structure, relationship, and general principles—should prompt us to ask why the common law remains so unorganized and policy-oriented. This issue is altogether separate from the merits of punitive damages: whether one agrees with the civil law's strong presumption against punitive damages or not, it is clear that on this, as on other issues, civil law systems can achieve more orderly and structured doctrines than common law systems. One need not be a civilian in order to

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61. Some of these studies are discussed in MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 746 (8th ed. 2006).

62. *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007) (holding that punitive damages may not be awarded to punish defendant for harm to non-parties); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003) (holding, among other things, that punitive damages may not be awarded "to punish and deter conduct that bore no relation to the [plaintiffs'] harm").

63. Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996).

64. *Id.* at 36–37.

appreciate the essential features of Professor Koziol's argument. Like him, American critics of punitive damages invoke the private law–criminal law distinction.[65] Top-down arguments from general principles may be comparatively less important in the common law, but they are still powerful, and the deductive chain from the civil–criminal distinction to "no punitive damages" is short and straightforward.

In order to understand the persistence of punitive damages in the common law, it is helpful first to identify the distinctive features of common law development over time. The general point here is that the growth of the common law is hardly logical and coherent. It is in fact more often quite the opposite. In his essay *Reason in the Development of the Common Law*, S. F. C. Milsom points out that in the early common law "judges d[id] not . . . make avowed changes in the law in response to arguments about social needs."[66] Elsewhere, in a passage that bears directly on my topic, Milsom describes "the mechanisms of change" in the formative era of the common law:

> All the lawyer can do for one hit by a rule is to look for a way round it, make a distinction, bring some new idea to bear. If he succeeds, the rule is formally unimpaired. If the route that the special facts of his client's case enabled him to take can be used by others, the result may be reversed, but the rule remains. Even when it is abolished or forgotten, its shape will be seen in the twisting route by which it was circumvented. And the ideas he has imported will prove their own strength. The first resort to them may have been artificial; but their natural properties will assert themselves, and consequences may follow as far-reaching as the ecological disturbances produced by alien animals or plants.[67]

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65. *See, e.g.*, Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitve Damages Procedures*, 69 VA. L. REV. 269, 351 (1983) (arguing that "discretionary punitive damages do not reasonably promote a legitimate nonpunitive interest. Criminal procedural protections, therefore, should be required in any discretionary punitive damages action").

66. S. F. C. MILSOM, STUDIES IN THE HISTORY OF THE COMMON LAW 150 (1985) [hereinafter MILSOM, STUDIES]. Milsom is speaking here of the early history of the common law. By contrast, modern judicial opinions do explicitly advance policy arguments in favor of holdings that change the law. *See, e.g.*, Li v. Yellow Cab Co., 532 P.2d 1226, 1232 (Cal. 1975) (asserting that fairness considerations justify the abandonment of contributory negligence as an absolute defense in favor of comparative negligence).

67. MILSOM, HISTORICAL FOUNDATIONS, *infra* note 96, at 6.

It may be true, as Ronald Dworkin argues, that over time much of the law "works itself pure," becoming "more coherent."[68] But Dworkin concedes that it is "never worked finally pure."[69]

Beginning on the "one case at a time" path, the common law has simply continued along that path. It still develops case by case with little systematic attention to its overall coherence, resulting in a large and disorganized body of decisional law.[70] From their origins in the medieval English law, tort law and criminal law have addressed some of the same social problems.[71] No one should be surprised that particular tort law doctrines, such as punitive damages, do not necessarily line up squarely with general propositions, such as the principle that punishment is not the aim of private law.

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68. RONALD DWORKIN, LAW'S EMPIRE 400 (1986). In this regard, Professor Milsom argues that "in the eighteenth [century] it was possible, for the first time since the romanesque attempt of *Bracton* five hundred years before, for Blackstone to give a coherent account of English law in more or less substantive terms." S.F.C. MILSOM, A NATURAL HISTORY OF THE COMMON LAW 21 (2003).

69. DWORKIN, *supra* note 68, at 400.

70. In this regard, consider the efforts of the American Law Institute, beginning almost a century ago, to impose order on the ever-growing number of common law cases by "restating" various doctrinal areas. *See Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROC. 1, 4–5, 15 (1923) (a primary aim of the Restatement is to distill black letter rules from the cases). Thus, a committee of distinguished judges, academics, and practitioners set to work and produced a Restatement of Torts in the 1920s. *See* William Draper Lewis, *History of the American Law Institute and the First Restatement of the Law: "How We Did It", in* RESTATEMENT IN THE COURTS 1, 3 (1945) (stating that the ALI's aims included "clarification and simplification of the law"). But the common law continued to grow, rendering the Restatement obsolete within a few decades. So another distinguished committee undertook a second Restatement of Torts in the 1960s. Again, the cases outran the Restatement, necessitating yet a third Restatement of Torts, the drafting of which is still underway. *See* John P. Frank, *The American Law Institute, 1923–1998*, 26 HOFSTRA L. REV. 615, 617 (1998) (noting that a primary aim of the Restatements was to reduce uncertainty in the law).

Of course, those who participate in the ALI Restatement projects are common lawyers by training, too, so their efforts extend beyond merely distilling principles from the cases. *See* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 604 (1995) (the ALI and similar institutions "do venture into areas where values conflict and traditional legal expertise is insufficient to generate effective solutions to the problems at hand").

71. *See* David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59 (1996). Professor Seipp points out that "[b]oth crime and tort fit into the larger category of breaches of the king's peace" and that "[t]he distinction between crime and tort was not a difference between two kinds of wrongful acts."

C. Historical Origins of Punitive Damages

With Milsom's framework in mind, consider the origins and history of punitive damages. The modern version of the doctrine first appeared in English law in the eighteenth century.[72] At that time, courts exercised little control over jury verdicts.[73] But pressure mounted for some judicial review of verdicts in cases where juries awarded damages for injuries that could not readily be measured in money, such as "affronts to the honor of the victims."[74] We would call these "nonpecuniary" damages. In the eighteenth century courts began to review these awards. In order to do so, they had to identify a rationale for them.[75] The "inexorable pressure to find some rational basis for awards . . . in cases in which no tangible loss had occurred resulted in judicial recognition that damages awards not only compensate the injured but also punish wrongdoers and deter wrongdoing."[76]

At about the same time, courts recognized the notion of "pain and suffering" as a means of compensating nonpecuniary injuries.[77] A strong commitment to systemic coherence would probably have led courts to combine the two doctrines, treating affronts to honor as a kind of nonpecuniary damage, either as an element of pain and suffering or as an adjunct to that doctrine. Indeed, the evolution of nonpecuniary damages over time has been in just that general direction, expanding the types of emotional harm that can be recovered under the heading of pain and

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72. It is important to note, however, that the notion of extracompensatory damages did not appear out of thin air. For hundreds of years, statutes had authorized the award of a multiple of the compensatory damages in certain circumstances. *See* 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES 5 & n. 26 (5th ed. 2005).

73. *See* Dorsey E. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 12–13 (1982) (while "[t]he first reported case in which a court implicitly recognized the power to set aside a jury verdict occurred in 1622 . . . courts were slow to accept the authority to override jury discretion").

74. *Id.* at 15. *See also* SCHLUETER, *supra* note 72, at 5–7 (discussing the early cases).

75. *See* SCHLUETER, *supra* note 72, at 7–8 (discussing the "Justification for Excessive Verdicts" explanation for the rise of punitive damages in eighteenth-century England).

76. Ellis, *supra* note 73, at 14. *See also* SCHLUETER, *supra* note 72, at 8–10 (discussing these rationales in the early history of punitive damages doctrine).

77. *See* Jeffrey O'Connell & Rita James Simon, *Payment for Pain & Suffering: Who Wants What, When & Why*, 1972 U. ILL. L. F. 1, 91 (1972) (containing, in relevant part, Appendix V consisting of a paper by Jeffrey O'Connell & Theodore M. Bailey, "The History of Payment for Pain & Suffering").

suffering.[78] But the case-by-case decision-making of the common law tends to result in a kind of compartmentalization. Dworkin points out that "[j]udicial opinions normally begin by assigning the case in hand to some department of law, and the precedents and statutes considered are usually drawn exclusively from that department."[79] Pain and suffering followed one track, while punitive damages took another.

Here, as elsewhere, the common law method is one that "produces great logical strength in detail and great overall disorder."[80] While this method can result in inconsistencies between two areas of doctrine, respect for precedent generally assures that logic will be respected in the internal development of a doctrine. Once punitive damages were introduced, the logic of reasoning from precedent kept them alive. Having devised punitive damages as a means of rationalizing large verdicts, common law courts stuck with the doctrine and elaborated on its content. This period in the history of tort law recalls Milsom's point about the role of reason in the common law generally: "The reasoning adopted yesterday may not have caused yesterday's result; but it governs the terms in which today's dispute is put to a court."[81] Thus, courts started by approving large jury verdicts on the rationale that they were aimed at making the defendant pay for affronts to the plaintiff's honor.

This rationale was chosen not because courts had made a considered judgment that tort damages are appropriately used as punishment, but because it fit the facts of the cases in which courts felt pressure from defendants to justify the large damages award. Hence, the courts' use of the concept of punishment in the early cases did not "cause[] yesterday's result."[82] Nonetheless, the theme of punishment adopted in the early cases "govern[ed] the terms on which" later issues were adjudicated.[83] Courts took this link between punitive damages and insulting behavior as the premise for deciding a host of issues as to the scope of punitive damages. The result was a full-fledged punitive damages doctrine in private law. In this way, punitive damages became deeply rooted in the

78. *See* DOBBS, *supra* note 1, at 1050 (noting that "[t]he pain for which recovery is allowed includes virtually any form of conscious suffering, both emotional and physical").

79. DWORKIN, *supra* note 68, at 251. This feature of common law adjudication corresponds roughly to what Dworkin calls "the local priority of interpretation." *Id.* at 402.

80. MILSOM, STUDIES, *supra* note 66, at 166.

81. *Id.* at 151.

82. *Id.*

83. *Id.*

common law, despite their incompatibility with the equally deep-rooted private law–criminal law distinction.

III. HISTORICAL CONTINGENCY AND LEGAL DEVELOPMENT

In my view, the gap between Continental European systems and common law systems on punitive damages illustrates a general point about legal development. The answer to the question of why the common law and the civil law diverge so sharply probably does not have much to do with different assessments of the pluses and minuses of allowing these awards.[84] Instead, it lies in historical differences between the civil law and the common law traditions.[85] Continental Europe and the Anglo-American world share a common political, cultural, and religious heritage. Yet their histories diverge in certain ways that have a bearing on all of private law, including punitive damages. In England, and later in America as well, the growth of private law took a different path from that followed by the nations of Continental Europe. Legal development on the Continent resulted in code-based legal systems, while the common law remained dominant in England and the United States. A system built on a civil code will be more internally coherent and will resist the intrusion of anomalous doctrines like punitive damages. A system that remains as unorganized as the common law, with its case-by-case decision-making, will be more accommodating. The punitive damages issue is just one among many differences in legal doctrine and legal institutions that can be traced to historical contingencies.

Two features of the Continental European context were absent in England. First, Roman law had much more influence on the

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84. Another explanation for the difference is that in Europe the loser pays the winner's attorneys' fees. By contrast, in the U.S. the contingent fee system systematically undercompensates the successful plaintiff so that punitive damages are needed for full compensation. *See* Koziol, *supra* note 3, at 761. Professor Koziol might have included the fact that European social welfare systems are more generous than those in the U.S., adding to the sense in the U.S. that strictly compensatory damages may not be sufficient to make the plaintiff whole.

These factors surely play a role in accounting for the difference between American and European attitudes toward punitive damages. But they cannot serve as a general rationale for the awards because most plaintiffs do not obtain them and because their award and the amount awarded depend not on whether the plaintiff needs them but on the jury's evaluation of the defendant's conduct.

85. *See* Posner, *Past-Dependency*, *supra* note 16, at 584 (discussing the phenomenon of "path dependence" or, in Judge Posner's punning variation, "past dependence").

development of European law than English law.[86] In some parts of Europe, Roman law remained alive even after the collapse of the Empire as the customary law of the region.[87] In others, Roman law was rediscovered in the eleventh and twelfth centuries as commerce began to revive.[88] It became an important component in new legal systems in France and Germany.[89] The significance of Roman law for present purposes is that lawyers in these societies learned at an early stage to conceive of law as a body of rules handed down from a law giver, not as a dynamic process.[90]

The second distinctive feature of legal development in Europe was the influence of the Revolution in France.[91] The Revolution shattered old social arrangements and laid the groundwork for the Napoleonic Code of 1804.[92] This Civil Code in turn became the model for efforts elsewhere in Europe to reform law and organize it more coherently into codes.[93] Lawyers already schooled in Roman law now learned that they were to look for answers in the Code and reason deductively from the general substantive and

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86. English jurists borrowed from Roman law from time to time. *See* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 297–99 (5th ed. 1956). But they never embraced Roman law, or large "blocks" of it, as the foundation for the legal system, as Continental Europeans did. *See* WATSON, *supra* note 29, at 14–22.

87. *See* JOHN DAWSON, THE ORACLES OF THE LAW 263, 265 (1968) (noting that "[t]he south of France . . . was already [by the late Middle Ages] governed by a vulgarized Roman law inherited from the earlier Middle Ages").

88. *See* O. F. ROBINSON, T. D. FERGUS, & W. M. GORDON, AN INTRODUCTION TO EUROPEAN LEGAL HISTORY 39–42 (1985) (describing "the eleventh-century recovery"); DAWSON, *supra* note 87, at 124–26 (describing the revival of Roman law in Italy).

89. *See* PETER STEIN, ROMAN LAW IN EUROPEAN LEGAL HISTORY 43–44 (1999) (describing the rediscovery of Justinian's Digest).

90. *See* WATSON, *supra* note 29, at 32 (describing the consequences for legal education of treating the *Corpus Juris* as authoritative).

91. *See* MERRYMAN, *supra* note 29, at 14–18 (discussing the disruptive impact of the Revolution).

92. *See* Joseph Goy, *Civil Code*, *in* A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION 437–48 (Francois Furet & Mona Ozouf eds., Arthur Goldhammer trans., Harvard Univ. Press 1989). Goy explains that the adoption of the Civil Code in 1804 was:

> [T]he result of a fortunate combination of factors: Bonaparte's determination to mark the end of the Revolution and the restoration of civil peace by completing work begun earlier . . . and the drafters' wish . . . to achieve a compromise between the old legal tradition and the novelties introduced by the Revolution.

Id. at 442.

93. *See* WATSON, *supra* note 29, at 121–25 (describing the influence of the French Civil Code in other civil law systems).

structural features of the Code to derive solutions to particular problems.[94]

Neither of these features of Continental legal development had much influence in England or America. The royal courts began making the body of law that was to become the common law after the Norman Conquest, nearly a millennium ago.[95] Initially, the driving force behind their work was the need to define their jurisdiction, limiting it to matters of special interest to the king.[96] Their orientation was not that of a tribunal that is handed a body of law and told to apply it. Rather, courts early on conceived of their role as a creative one, determining just where to draw lines between matters within their jurisdiction and those outside it and how to adapt the jurisdictional rules to address new problems.[97] Later, as the jurisdiction of the royal courts gradually displaced that of local courts, the body of law they made became common all over England.[98] This view of law as a dynamic process remained the model under which lawyers argued and judges decided novel issues, and it endures to this day.[99]

As for the French Revolution, it had little impact on legal development in England and America. The common law had over the centuries acquired an excellent reputation in England.[100] Though the Americans rebelled against the English government, they adopted the common law, with modifications, as the basis for their legal systems.[101] These features of English and American

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94. *See supra* text accompanying notes 29–45.

95. *See* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 11–15 (2d ed. 1979) (describing the origins of the common law).

96. *See* S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 33–36 (2d ed. 1981) [hereinafter MILSOM, HISTORICAL FOUNDATIONS] (describing the "writ system," which limited the jurisdiction of the early king's courts).

97. *See id.* at 36 (describing "the mechanism of change within the common law" as "the product of men thinking").

98. BAKER, *supra* note 95, at 25 ("[N]o one had decreed that the common law should prevail; but a stream of expedients had gradually produced a situation in which the old ways of doing things died a natural death.").

99. Of course, early in the development of the common law, judges viewed their task as one of finding the law, while later they came to see themselves as making law. But that difference seems unimportant for present purposes.

100. *See* J. G. A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 38 (1987) ("political and social thinking" in seventeenth-century England were "largely dominated by" the common law).

101. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 299–300 (1969) (noting that "[a]t the Revolution most of the state constitutions provided for the retention of as much of the English statute and common law as was applicable to the local circumstance").

history helped to put legal development on a different path than the one taken in Continental Europe after the French Revolution. The idea of abandoning the common law in favor of a civil code never caught on in either country.

For better or for worse, English and American courts were stuck with (or blessed with) the common law. A critic would complain that Britain and America never made a clean break with the past and never got a fresh start. A champion of the common law might respond that it has served us well for centuries and will continue to do so. My aim is not to enter that debate but to point out that the American doctrine on punitive damages is largely the result of the historical events that gave us the common law and its distinctive history.

That history produced a method of reasoning that emphasizes the case at hand. Common law courts take one case at a time and resolve each case by applying the most clearly relevant precedents. They do not always, or even usually, step back and ask whether one doctrinal thread is compatible with another. They use whatever argument may be available to get the result they seek in the case at hand, without necessarily showing much regard for the original purposes of the materials on which they rely or attempting to reconcile all of the conflicts among those materials. As a result, "[t]he life of the common law has been in the abuse of its elementary ideas."[102] Punitive damages doctrine is a manifestation of the "great overall disorder"[103] this approach produces. Courts did not deliberately take up the issue of whether punitive damages were appropriate, evaluate the advantages and disadvantages, and conclude that on balance they were advisable despite the civil–criminal distinction. Rather, following the characteristic common law method of deciding the case first and then identifying the principle,[104] they adopted the notion of punitive damages as a way to rationalize large awards they were reluctant to overturn. Proceeding in this piecemeal way, courts never directly faced the basic conflict between two broad principles: (1) that the aim of private law is to settle the rights and duties of the parties by requiring the wrongdoer to make the plaintiff whole; and (2) the notion that damages may be used to punish the defendant as a way of supplementing the criminal law.

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102. MILSOM, HISTORICAL FOUNDATIONS, *supra* note 96, at 6.

103. MILSOM, STUDIES, *supra* note 66, at 166.

104. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 892 & n.47 (2006) (according to "the conventional common law wisdom," the "perception of at least one actual controversy . . . systematically produces better rules").

IV. CONCLUSION

Quite apart from the substantive content of law, civilians reason differently about legal problems than do common lawyers. Despite a common political, religious, and cultural heritage, they frame issues differently and favor distinct sets of arguments. Lawyers from both traditions can benefit from studying how the other group approaches case-deciding and lawmaking. Sharpening our understanding of alternative ways of thinking about law encourages us to examine premises that we have internalized by immersion in our own legal systems and that we would otherwise be inclined to accept without giving them much thought.

The punitive damages issue is a straightforward example of how consciousness of alternatives can alter our assessments of a rule or practice. Here is a more subtle illustration, and one that draws on an aspect of common law reasoning touched on above: many Americans may accept without much thought Holmes' view that "the merit of the common law" is "that it decides the case first and determines the principle afterwards."[105] Frederick Schauer, however, takes issue with this proposition.[106] In his view, the common law method tends to put too much weight on the particulars of a given case, diverting attention from the question of what would be the best general rule. Schauer offers a complex argument in defense of his view, relying mainly on the psychological distortion created by dwelling on a particular set of circumstances.[107] A careful scholar, Schauer does not attempt to draw support from the civil law method, though its tendency to minimize the role of the particular case seems to fit his thesis.[108] His caution is understandable, for the existence of an alternative does not prove that the alternative is better. Nonetheless, his argument is made more plausible by the very existence and durability of the civil law approach simply because many of us are disinclined to endorse an argument for modifying or abandoning a

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105. Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870), *reprinted in* 1 THE COLLECTED WORKS OF JUSTICE HOLMES 212 (Sheldon M. Novick ed., Univ. of Chicago Press 1995). According to Louis Menand, Holmes' aim in writing *The Common Law*, a major achievement of his early career, was to explain this remark. *See* LOUIS MENAND, THE METAPHYSICAL CLUB 338 (2001).

106. *See* Schauer, *supra* note 104, at 884 (arguing that "concrete cases [may be] more often distorting than illuminating").

107. *See id.* at 893–99 (on the distorting effect of the case at hand).

108. In concluding his article, Schauer says that his aims are "modest," and do not include a "claim that civil law regimes are better than common law ones." *Id.* at 917.

current practice (in law or in any other aspect of our lives) unless we have a concrete alternative with which to compare it.

In the day-to-day work of judges and lawyers, comparative law is surely a useful tool. Learning about other legal systems contributes insights to the task of choosing among alternative substantive rules in contract law, tort law, and so on. But that is not all. With punitive damages serving as an example, I have attempted to show that the comparative method is indispensable to understanding the links between doctrine and the legal culture that produces it. Since "the nature of any . . . relationship [between legal systems], the reasons for the similarities and the differences, is discoverable only by a study of the history of the systems or of the rules,"[109] comparisons should pay close attention to the history of legal development. Whether the topic is punitive damages or anything else, comparative law must take account of the historical contingencies that put Anglo-American law and Continental European legal systems on different paths. Their divergence over punitive damages shows that sometimes the different paths have led to quite distinct doctrinal outcomes.

109. ALAN WATSON, LEGAL TRANSPLANTS 6 (1974). *See also* Ewald, *supra* note 22, at 1981–87 (describing and criticizing what he calls the "'telephone-book approach' to comparative law").